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In The

Supreme Court of the United States

No. 461

LIFETIME SIDING, INC., A CORPORATION,
Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1. PETITIONER, for its Petition for Certiorari, and with reference to Rule 23 of the Supreme Court Rules, respectfully shows the Court:

(a) DECISIONS IN LOWER COURTS

Judgment on a special two question jury verdict was returned for the government May 27, 1964, in the United States District Court for the Western District of New York before District Judge John O. Henderson; judgment dismissing plaintiff-petitioner's complaint for tax refund under Federal Insurance Contributions Act and Federal Unemployment Insurance Act provisions was entered based upon the special verdict June 4, 1964; plaintiff appealed to the United States Court of Appeals for the Second Circuit which affirmed the verdict and judgment of the District Court on March 22, 1966, in a unanimous opinion by District Judge Timbers, Chief Judge of the District of Connecticut, sitting by designation, and also before Kaufman and Hays, Circuit Judges, reported 359 F. 2nd. 657, appended to this petition as Appendix B.

(b) STATEMENT OF JURISDICTION

Jurisdiction of the United States Supreme Court and of the Federal Courts is invoked on the grounds that this is an action pursuant to a Federal Statute, 28 United States Code Sec. 1346(a), (1), and under 28 United States Code Sec. 1291 on a denial of a claim by petitioner for refund of taxes claimed by it to have been erroneously paid under the Federal Insurance Contributions Act, 26 U.S.C., Secs. 3101-3125, and Federal Unemployment Tax Act, 26 U.S.C., Secs. 3301-3308.

(i) Both the judgment on the special verdict in the United States District Court for the Western District of New York and the affirmance thereof in the United States Court of Appeals for the Second Circuit are respectfully here petitioned for review.

(ii) No application or order has been made respecting a rehearing in the lower Courts; an order extending time to file Petition for Writ of Certiorari to and including August 19, 1966, was signed by the Hon. John M. Harlan, Associate Justice of the Supreme Court of the United States dated June 17, 1966.

(iii) It is believed that this Court has jurisdiction to review by certiorari in its discretion this instant action for refund of taxes allegedly erroneously paid under specialized taxing statutes FICA and FUCA cited in (b) supra, and such action has been properly laid and exclusively so, in the Federal Courts pursuant to a special provision by statute allowing such suit (28 U.S.C., Sec. 1346(a), (1), and 28 U.S.C., Sec. 1291); further Constitutional jurisdiction is conferred since this claim is a suit against the United States of America.

(c) QUESTIONS PRESENTED FOR REVIEW

1. *Can a jury of laymen, under the specialized FICA and FUCA taxing statutes, properly return a special-question verdict calling for the legal conclusion whether certain workers, known as siding applicators (home improvement contract workers), are in the legal relationship of "independent contractor" to a "principal", on the one hand, or in the nature of "common law employees" to an "employer" on the other (two expressly submitted special questions); or, should a special verdict on stated questions in such case be submitted to the jury for findings of fact as to the actual day-to-day common law working relationship under the "control test", which test is expressly required in such cases by the applicable regulations?* Petitioner submits that the two special questions submitted on the trial of this action were improper. They were as follows:

> "1) During the period from July 1, 1957 through June 30, 1960, did a principal-independent contractor relationship exist between the plaintiff and its applicators?" "Answer: No."
>
> "2) If your answer to question one is no; during the period from July 1, 1957 through June 30, 1960, did an employer-employee relationship exist between the plaintiff and its applicators?" "Answer: Yes." (Record, p. 356)

To answer these purely legal questions requires knowledge on the part of a lay jury of the law of agency and in particular of the total common law applicable to the determination of common law employee status in relation to a common law employer; further, this special verdict and these special questions were error in calling for a lay jury to determine a legal issue of the nature of independent contractor-principal relationship when the applicable statutes (FICA and FUCA) and regulations thereunder call solely

for a determination in such an action of whether or not common law employer-employee relationship exists: the case law hereunder clearly establishes that the relationship may be other than common law employer-employee and still not be principal-independent contractor, i.e. the two kinds of relationship are not mutually exclusive. *Party Cab Co. vs. United States,* 172 F. 2nd 87, 10 ALR 2d 358, 363 (C.A. 7th Cir., 1949), cert. denied, 338 U. S. 818, 94 L. Ed.—, 70 S. Ct. 62, 1949.

2. *Is an "applicator case", such as the instant claim, controlled by the common law tests of the status of "employee" as specified in the definitions contained in the FICA-FUCA taxing statutes as explained by the Treasury regulations thereunder as the "control test", (that is, whether or not the claimant exercises control over the result only or over the means of achieving that result) or is the law of the case some hybrid extension of this common law test referred to as the "total situation" or "economic reality" test purportedly established by the decisions of this Supreme Court in United States vs. Silk,* 331 U. S. 704, 91 L. Ed. 1757, 67 S. Ct. 1463, 1947, *Harrison vs. Greyvan Lines,* 331 U. S. 704, 91 L. Ed. 1757, 67 S. Ct. 1463, 1947 *and Bartels vs. Birmingham,* 331 U. S. 126, 57 S. Ct. 1547, 91 L. Ed. 1947, 1947. Petitioner respectfully submits that the *law of the case* is either the common law test of employee status or it is not; legislation subsequent to the cited Supreme Court decisions has abregated the so-called "total situation" or "economic reality" tests and reaffirmed that the legislative intention under the FICA and FUCA taxing statutes is to use solely and without other elaboration the test of the common law as to the existence or non-existence of the relationship of employer-employee: see Public Law No. 642, 63 Statutes 43A (2 U. S. Code Congressional Service, 1948, p. 1752 et seq.). Petitioner submits that it has

not been afforded a trial that meets the standards of due process of law or equal protection of the laws as guaranteed by the 14th Amendment, U. S. Constitution, in that its trial and the affirmance of the resultant verdict and judgment by the United States Court of Appeals for the Second Circuit were based on a fundamental misconception of the law of the case, that is, the application of a rule of law other than and outside the scope of the requirements of the FICA and FUCA statutes and applicable regulations that only the common law tests of the meaning of employee be used; and indeed, the petitioner claims that it was thus deprived of its right to a fair trial by reference to and use of a "total situation" or "economic reality" test going unconsionably above and beyond allowable common law tests, to excuse the introduction of improper proof into evidence to an inordinant and reversibly prejudicial extent, so great as to render a fair trial impossible as a matter of law. Petitioner respectfully submits that the only proper proof in a trial of such a claim is of the actual day-to-day working relationship between the claimant and the workers involved; if this be so, other evidence such as that such workers were "employees" for pension plan purposes under the Internal Revenue Service Pension Trust and Exempt Organization Group clasification, or under the New York State Department of Labor classifications, to name only two aspects of multiple collateral specialized definitions used in this particular trial, are irrelevant and prejudicial, and constitute reversible error of law, whether the claim be tried to a jury or a Judge without a jury. Opinion by the United States Court of Appeals for the Second Circuit rejected this claim that such evidence was irrelevant (359 F. 2nd. 657, p. 661) apparently on failure by plaintiff's trial counsel to object to a specific charge to the jury, viz., that " . . . the intent and belief of the parties as to the legal relationship in issue was

one of the factors among many to be considered by the jury", and apparently on the basis of accepting this element of proof as a part of the "total situation" or "economic reality" catch-all; the same Second Circuit opinion observed at p. 661 that the issue of whether such evidence constituted prejudice was a "closer question" but that the District Court, "sensitive to the pulse of the trial" was in a position to control this evidence to avoid prejudice to the claimant. Petitioner respectfully submits that if the evidence is not properly admissible because allowed by way of reference to the wrong law of the case, then no degree of sensitivity to the pulse of the trial on the part of the District Judge can save such evidence from depriving the claimant of a fair trial. Fair trial of such a claim can only be realized if conducted under a right concept by the Court of the law of the case. Such was not the situation in the instant case and, petitioner believes, was not obtained in the majority of such cases under FICA and FUCA claims involving the "employee" issue.

3. *Even under the common law "control" test of employee status in issue, does the intention and belief of the parties, or the intention and belief of the claimant and the workers (applicators) as to the nature of their legal relationship constitute a proper "factor" or "incidence" of control under the banner of which the Court and jury can receive proof?* Extensive evidence was admitted on this trial as to whether or not certain agents and representatives of the claimant referred to the applicator workers as "employees" in connection with liability insurance, in correspondence with a Better Business Bureau in Buffalo, New York, or in sales promotion literature prepared by salesmen workers of the claimant, all in addition to such other evidence as the determination of the status of appli-

cators by a New York State Labor Department agency or by the Pension Plan Division of the Internal Revenue Service; the trial Court made the following charge to the jury which this petitioner submits as a basic error of law and in conflict with established case authorities in point as well as with basic rules of evidence:

> The evidence relating to the New York State agency is relevant only insofar as it may disclose *the intent and belief of the parties as to their relationship* . . . (emphasis supplied)

It is not pertinent here on this application to detail the accumulated items of evidence which this petitioner claims to be irrelevant and prejudicial because submitted under this charge of the Court and constituting reported proof of the subjective attitude of mind of the claimant and its representatives toward the applicator workers and vice-versa as if such subjective lay concept of the legal relationship could be proof of the existence of such legal relationship; suffice it to say on this application that the petitioner claims that the record is burdened with such a gross bulk of such objectionable evidence as to constitute an unfair trial of the claim and the denial of due process of law and of equal protection of the laws as guaranteed to this claimant by the United States Constitution and the Bill of Rights, Amendment 14.

4. *Does an appellant waive his right on appeal to object a specific charge of the trial Court as to which on the trial no specific objection was made or exception taken at the time of the charge where general objections to the evidence forming the basis of the charge have been made throughout the course of the trial and in conjunction with motions for directed verdict, and where special verdict on general stated questions, and not a general verdict, is involved?* The Sec-

ond Circuit has held that the petitioner failed to preserve his right to object on appeal to the specific charge of the trial Court allowing the jury to consider certain evidence under a factor of control to show the intent and belief of the parties as to their legal relationship by the failure of appellant to make specific objection and exception to such charge. Petitioner submits that the holding by the Second Circuit to the effect that failure to object to a specific charge waives the right to object on appeal is erroneous because it conflicts with established case law applicable to special verdict cases and, further, that it is a side-stepping by way of a procedural technicality of the real issue of the case which surrounds this charge.

(d) STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Set forth in Appendix A hereto.

(e) STATEMENT OF THE CASE

This action involves a claim by a private corporation as plaintiff-petitioner for refund of taxes erroneously paid under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act for taxable periods July 1, 1957 through June 30, 1960, in a total amount of $7,556.80. The sole question in issue is whether or not certain workers, known as siding applicators, are employees within the meaning of that term in the specialized taxing statutes abbreviated as FICA and FUCA. This claim was tried to a jury in the United States District Court in the Western District of New York on a special verdict question as follows:

> "1. During the period from July 1, 1957 through June 30, 1960, did a principal-independent contractor relationship exist between the plaintiff and its applicators? Answer: No.

2. If your answer to question one is no; during the period from July 1, 1957 through June 30, 1960, did an employer-employee relationship exist between the plaintiff and its applicators? Answer: Yes. (Record, p. 356)

Upon this jury verdict, judgment was rendered June 4, 1964, in favor of the defendant government dismissing the complaint.

Basic errors claimed by the petitioner in this verdict and judgment are indicated in the "Questions Presented" summarized in paragraph (c), supra, and in the "Argument" herein in subparagraph (h), infra; these basic complaints are that there was no issue to be submitted to a jury, that the issue involved could not properly be submitted to a jury of laymen because it involves the meaning of specialized taxing statutes which were not referred to in the special questions submitted to the jury, and because of a basic error of law which permitted the introduction of irrelevant and prejudicial evidence by the government in the form of a proof of subjective intent of the "parties" and of the workers whose legal status was in issue on a theory that the determination of the meaning of "employee" as contained in the FICA and FUCA involves a test that goes beyond the limitations of common law, referred to in some of the case law and by legal writers as the "economic reality" or "total situation" test. Applicable Treasury regulations reciting that in doubtful cases determination shall be " . . . upon an examination of the particular facts of each case" is not an incorporation of the "total situation" or "economic reality" test which exempts the Court and the government from the limitations of the law of evidence. Further, petitioner complains that in this particular type of case there has developed in the approach to trial a gross

abuse of the basic rules of the type of evidence allowed to prove what is an improper object of proof, namely, subjective intent or regard of lay parties as to a given legal status as if such proof could establish such legal status, in the same way as a man by saying that he is a monkey could by such mere statement tend to prove the fact.

Petitioner respectfully calls the attention of this highest Court of the land to his complaint here because he believes that the record of his case is so rife with improper evidence submitted under an improperly inflated view of the Congressionally rejected rule of law of the *Silk* and *Greyvan Line* cases that justice demands a setting right by direction of this Court that only the limited common law test as the rule of law of the case be applied, and only thereby can the petitioner be afforded due process and equal protection constituting the stuff of the fair trial of his claim of which he has been deprived. The following items of evidence were used to form the basis of the defense, all of which are outside the scope of the day-to-day working relationship of the workers whose legal status is in issue, and indeed all of which, petitioner claims, is reversibly prejudicial:

(1) Reference to a brochure on a pension plan devised by the plaintiff corporation through an agent Massachusettes Mutual Insurance Company and submitted to the Internal Revenue Service never produced at the trial, claimed by the government to constitute truth of the working relationship of the parties because in it the applicator-workers are referred to as "employees" for the purposes of pension plan tax treatment. (Record, p. 162)

(2) Admission of letters by counsel for the government written to various Federal and State governmental agencies during the pendency of the very action on trial for hypothetical rulings on assumed facts in issue in the pending case for proof of the ultimate question involved in the law suit, whether

or not for FICA and FUCA purposes and for other collateral governmental or statutory purposes the applicator workers of this contractor-claimant were "employees" or "independent contractors". (Government exhibit G-13) (Record, p. 228)

(3) Admission into evidence and subsequent withdrawal without further comment by Court or counsel of certain items of correspondence between counsel for both the claimant and for the government and by other governmental agencies respecting the pending law suit, and an item of correspondence involving an entirely collateral and totally unrelated case and set of facts containing an informal conclusion ruling from another governmental agency (New York State Department of Labor) as to the status of certain workers; letter exhibit P-8 (Record, p. 190 et seq; District (trial) Court withdraws original admission into evidence of exhibit P-8, Record, p. 288, et seq.)

(4) Use, and reading to the jury by counsel for the government, of the contents of a sales pamphlet prepared by salesmen respecting sales operation, when the salesmen's status is not in issue in the lawsuit, which sales pamphlet was entitled "The Voice of Lifetime". (Record, pp. 280-283)

(5) Testimony as to the language and form of address recommended by supervisor agents of the plaintiff contractor to be used between salesmen of the plaintiff corporation and the siding applicators whose relationship to plaintiff contractor only, and not to salesmen third parties, is alone in issue. (Record, pp. 249-250)

(6) Correspondence between a Better Business Bureau in Buffalo, New York, and the president of the plaintiff-contractor corporation on the company practice of making repairs on jobs done (Record, p. 151-153)

(7) Correspondence between the president of plaintiff-claimant corporation and a customer in answer to a complaint filed by the customer with the Better Business Bureau office in Buffalo, New York (Record, pp. 151-153)

(g) Basis of federal jurisdiction as recited in paragraph (b), supra.

(h) REASONS FOR ALLOWANCE OF *WRIT OF CERTIORARI*

Petitioner submits that this case presents a gross example of the abuse of the jury system of trial in a case involving a purely legal issue; it is believed that this case demonstrates that this highest Court of the land should reconsider the entire question of the propriety of a jury trial of such an issue wherein evidence has been allowed of collateral legal "employee" relationships, calling for highly technical tax statute definitions to be applied by lay members of a jury. The United States Court of Appeals for the Second Circuit in its opinion in this case observed at pages 658-662:

> While we may question the *wisdom* as a matter of policy of claiming such a case for jury trial, raising judicial eyebrows is about all we can do . . .

This Court has power to do more than merely raise its judicial eyebrows at the denial to this claimant of a fair trial of his claim for tax refund under the specialized FICA and FUCA taxing statutes. At the least this Court through this case should clearly resolve whether or not the common law "control" test is to be properly and strictly applied in such trials or if the earlier and subsequently Congressionally outlawed "total situation" or "economic reality" tests, going substantially beyond the common law tests expressly and strictly called for by the statutes and the applicable Treasury Regulations, are finally to be the law of such cases. This case, it is respectfully submitted, is one of hundreds in litigation in the Federal Courts in which

evidence has been permitted to go to a jury on claim for jury trial by the government, which is prejudicially collateral to the legal issue to be resolved, and which is not relevant or within the scope of the common law test however liberally construed; all this evidence is swept into such trials under the banner, waved wildly by the government, of proving a so-called "total situation" of the "economic reality" of the claimant's whole conduct of his private business and personnel policies.

Under such interpretation, any action, correspondence, or conduct of anyone dealing in any capacity with the plaintiff in his business becomes competent evidence. It is high time for this Supreme Court to direct a return to the "courtroom reality" of the common law "control" test alone and stake out or dismiss altogether the use of the so-called "economic reality" test which currently confuses beyond unraveling any attempt to fairly try the meaning of "employee" under the FICA and FUCA. If the irrelevant and prejudicial evidence contained in this record be deleted therefrom, no "close question" remains as in the view of the United States Court of Appeals for the Second Circuit, and no reasonable jury of laymen, free from the overwhelming confusion of determining multiple IRS and New York State and insurance meanings of "employee", could "reach differing conclusions on the issue" (359 F. 2nd, p. 662) (Second Circuit, opinion below). Upon such deletion, no issue of fact is in conflict to be resolved by a lay jury, and petitioner believes judgment must be directed for it as a matter of law.

Petitioner further submits that the allowance in this case, and similar cases, of refund claims under the FICA and FUCA, of proof of the subjective intention or attitude of mind of "the parties", which involves proof of the sub-

jective concept by law personnel representing the claimant and of the lay workers, or "applicators" themselves, as to the legal status of their relationship cannot properly be a "factor" in the "control" test under the common law. Allowance of the use of such evidence as such a "factor" is in conflict with express holdings of this Supreme Court and of lower Courts, outlawing the use of language or labels of "employee", for example, use of "employee" in contracts between the workers whose status is in issue and the claimant, as if such label could be proof of or tend to establish the employer-employee relationship. In *United States vs. Silk,* 331 U.S. 704, at page 715, this Court observes:

> So far as the regulations refer to the effect of contracts, we think their statement of the law cannot be challenged successfully. Contracts however "skillfully devised", *Lucas vs. Earl* 281 U. S. 111, 115 should not be permitted to shift tax liability as definitely fixed by the statutes. (Cases cited, footnote 10).

In *Bartels vs. Birmingham,* 331 U.S. 126, 1947, a contract referred to as "form B" between the owner-operator of a dance hall and a bandleader on behalf of the bandleader as principal and the musicians composing his band, which designated the owner-operator of the dance hall as the "employer" and the bandleader and his musicians as "employees" was proscribed as proof sought to be used by the government that the band and the musicians were "employees" under the Act, and this Court reversed a holding on this issue in the Eighth Circuit, while observing further that the Treasury regulation promulgated to the same effect was beyond the power of the tax commissioner to issue. Note also, Code of Federal Regulations, cumulative supplement, 1944, No. 107, promulgated under the FUCA, paragraph 5:

> If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence if the employee is designated as a partner, co-adventurer, agent or independent contractor.

Note also an analagous situation in *Commissioner vs. Duberstein,* 36 U.S. 278, 286 in which the prohibition against "subjective mind" evidence is asserted by Mr. Justice Brennan:

> The government says this "intention" of the transferor cannot mean what the cases on the common law concept of gift call "donative intent". With that we are in agreement for our decisions fully support this. Moreover the *Bogardus* case itself makes it plain *that the donor's characterization of his action is not determinative—that there must be an objective inquiry as to whether what is called a gift amounts to it in reality.* 302 U. S. at 40 (referring to *Bogardus vs. Comm.,* 302 U. S. 34) *It scarcely needs adding that the parties' expectations or hopes as to the tax treatment of their conduct in themselves have nothing to do with the matter.* (emphasis supplied)

Such evidence of collateral "employee" status under other-purpose statutes than FICA and FUCA in issue, have been outlawed in other cases with which the decision in this the instant case is in conflict : See *Dimmit-Rickoff-Bayer Real Estate Co. vs. Finnegan,* 179 F. 2d. 882 (C.A. 8, 1950) cert. denied, 340 U.S. 823, 71 S. Ct. 57, 95 L. Ed. 604, wherein it was held error, 179 F. 2d at page 885:

> For the purposes of this opinion it may be conceded that the question of the coverage of the Federal Taxing Act in suit is a matter of Federal, and not of State, law and that the District Court and this Court are not concerned with whether the salesmen were or were not entitled to unemployment compensation under the law of Missouri.

Similarly in *Thor Company vs. The United States,* 173 F.S. at p. 69:

> The sole issue here is whether these applicators were employees within the meaning of the pertinent Federal Tax Statutes. This question cannot be determined by whether or not they were employees within the meaning of the State Workman's Compensation Law or some Hospital Insurance Plan. *Dimmit-Rick-off-Bayer Real Estate Co. vs. Finnegan,* Eighth Circuit, 179 F. 2d. 882; *Ewards vs. United States,* Ct. Cl. 168 F.S. 955, 958, *much less is it determined by what plaintiffs rightly or wrongly may have thought the status of the applicators was under such a State statute or private plan.* (emphasis supplied)

Petitioner's argument that the "economic reality" or "total situation" test cannot properly be applied as the law of the case is not solely the view of the Congress but has been recognized in the case law; note the holding in the District Court of New Jersey in 1956 in *Millard's, Inc. vs. United States,* 146 F.S. 385, respecting the attempt to introduce "label" and collateral evidence under the banner of the "economic reality" test; at page 388 of the opinion:

> There is evidence in this case indicating that normally those applicators did not engage in work for others (though they might perchance have done so legally), while they were working for Millard; there is evidence that Millard carried its sign on these jobs; that its superintendent was generally spoken of as "the Boss"; that the applicators ordinarily referred third parties looking for roofing work to Millard. *But all this and more, goes primarily to the question of whether the applicators were "dependent as a matter of economic reality upon the business" of Millard. All this is therefore largely beside the point insofar as this case is concerned.* (emphasis supplied)
>
> . . . moreover the Act (Social Security) is not to be understood, as it often previously had been understood, to define an "employee" as "an individual in

> a service relationship, who is dependent as a matter of economic reality upon the business to which he renders service, and not upon his own business as an independent contractor". *This latter has now been definitely discredited by the Congress itself as not being the intent of the Act.* (emphasis supplied)

Submission to the lay jury of the ultimate legal conclusion in the form of special questions is claimed by this petitioner to be improper and also to be in conflict with existing authority. In the instant case the following two special questions were submitted: (1) [During the period in question], did a principal-independent contractor relationship exist between the plaintiff and its applicators? Answer: No; (2) If your answer to question one is no; [during the period in question], did an employer-employee relationship exist between the plaintiff and its applicators? Answer: Yes (Record, p. 356).

Question number (1) called for the jury to draw a legal conclusion as prerequisite to reaching the actual legal issue of the case as framed in question (2). *Party Cab Company vs. United States,* 172 F. 2d 87, 10 ALR 2nd. 358, C.A. Seventh Cir. 1949, cert. denied, 338 U.S. 818, 94 L. Ed. —, 70 S. Ct. 62, 1949, is authority expressly holding that the issue in such cases is solely whether the workers are employees under the common law rules under FICA and FUCA, and not whether or not such workers are independent contractors or in some other legal status; in the *Party Cab Company* case at 10 ALR 2nd. 363, the Court holds:

> We think it should be noted that Congress by the language thus employed did not exclude from coverage merely those who have the status of an independent contractor but, without describing them, others not employees under common law rules. This observation is relevant because the problem has often been considered as though there was a single alternative,

> that is, that the person in question must be treated either as an employee or as an independent contractor. In fact, the Board in the instant case reasons that the taxi drivers were not independent contractors and therefore they must be employees, thereby ignoring the language of the Amendment which recognizes that there may be those other than independent contractors who do not come within the scope of the term "employee".

And at 172 F. 2d. 93, 10 ALR 367 in the same decision:

> . . . Assuming, however, that the drivers cannot be properly classified as independent contractors in the common acceptance of that term, it does not necessarily follow that they are "employees" within the meaning of the Act. An affirmative conclusion that they are such employees cannot be arrived at by the process of elimination. As we have heretofore shown, Congress by its 1948 Amendment recognized that under the common law there are those other than independent contractors who are not employees.

Petitioner further submits that if anything is to be ultimately submitted to a jury of laymen on a claim for refund under FICA and FUCA, it should be upon special questions only for specific findings of permissible "factors" of the day-to-day working relationship of the workers whose status with the claimant is in issue, such as, whether or not the applicators in question supplied their own tools and equipment, provided their own transportation, worked by piece work or by the job, or by the hour, or otherwise, etc.

Opinion in the United States Court of Appeals for the Second Circuit cites numerous authorities at page 660, 359 F. 2d. 657, for the proposition that the appellant may not complain of basic errors in the charge of the Court where it has failed to take exceptions to the charge or request the Court to further charge the jury. This rule

conflicts with authorities holding that it is inapplicable in cases where a fundamental error of law is claimed in the submission of the case to the jury in the first place, as established by the length arguments of motions for directed verdict on behalf of the plaintiff-claimant at the beginning of the case and at the conclusion of all the evidence, and especially upon motion for verdict on special questions respecting the "factors of control" under the strict common law test. (Record pages 325-326; *Century Furniture Company vs. Bernhard's, Inc.*, 82 F. 2d. 706, C.A. 9th, 1936, *Allstate Insurance Company vs. Springer*, 269 F. 2d. 805, C.A. 6, 1959, *Fleischmann Const. Co. vs. United States*, 270 U.S. 349, 356, 46 S. Ct. 284, 288, 70 L. Ed. 624 1926, *Traders & General Insurance Co. vs. Mallitz*, 315 F. 2d. 171, C.A. 5th, 1963.)

Respectfully submitted,

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716-325-6626

APPENDIX A

PETITION FOR CERTIORARI

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of March One-thousand nine-hundred and sixty-five.

Present:

HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges,
HON. WILLIAM H. TIMBERS,
District Judge.

LIFETIME SIDING, INC.,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Respondent.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1965

LIFETIME SIDING, INC.,

Petitioner,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERITIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 19th, 1966.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States

Dated this 17th
day of June, 1966.

APPENDIX A TO PETITION FOR CERTIORARI

Federal Insurance Contributions Act (28 U.S.C. 1958 ed., Sec. 3101) *Subchapter B — Tax on Employers.*

Sec. 3111 [as amended by Sec. 202(c), Social Security Amendments of 1956]. *Rate of Tax.*

In addition to other taxes, there is hereby emposed on every employer an excise tax with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

(1) with respect to wages paid during the calendar years 1957 to 1959, both inclusive, the rate shall be 2¼ percent;

(2) with respect to wages paid during the calendar years 1960 to 1964, both inclusive, the rate shall be 2¾ percent;

* * *

(26 U.S.C. 1958 ed., Sec. 3111.)

Sec. 3111 (as amended by Sec. 401(c), Social Security Amendments of 1958, supra.) Rate of Tax.

In addition to other taxes, there is hereby imposed on every employer an excise tax with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

(1) with respect to wages paid during the calendar year 1959, the rate shall be 2½ percent;

(2) with respect to wages paid during the calendar years 1960 to 1962, both inclusive, the rate shall be 3 percent;

(26 U.S.C. 1958 ed., Sec. 3111) Subchapter—General Provisions, Sec. 3121. *Definitions* * * *

(d) *Employee*—For purposes of this chapter, the term "employee" means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; * * *

if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed.

(26 U.S.C. 1958 ed., Sec. 3121.)

Chapter 23—Federal Unemployment Tax Act Sec. 3301. *Rate of Tax.*

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1955 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 percent of the total wages (as defined in section 3306(c)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)) after December 31, 1938 * * *

(i) *Employee*—For purposes of this chapter, the term "employee" includes an officer of a corporation, but such term does not include—

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

* * *

(26 U.S.C. 1958 ed., Sec. 3306.)

Treasury Regulations on Employment Tax (1954 Code):

Sec. 31.3121(d)-1 *Who are employees.*

(a) *In general.* (1) Whether an individual is an employee with respect to services performed after 1954 is determined in accordance with section 3121(d). This section of the regulations applies with respect only to services performed after 1954. * * *

(2) Section 3121(d) contains three separate and independent tests for determining who are employees. Paragraphs (b), (c), and (d) of this section relate to the respective tests. Paragraph (b) relates to the test for determining whether an officer of a corporation is an employee of the corporation. Paragraph (c) relates to the test for determining whether an individual is an employee under the usual common law rules. Paragraph (d) relates to the test for determining which individuals in certain occupational groups who are not employees under the usual common law rules are included as employees. If an individual is an employee under any one of the tests, he is to be considered an employee for purposes of the regulations in this subpart

whether or not he is an employee under any of the other tests.

(3) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(4) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees.

(5) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment (see Sec. 31.3121(b)-3).

(b) *Corporate Officers.* Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not

only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place of work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees. If an individual enters into an agreement with another person pursuant to which such individual undertakes to produce a crop or livestock on land owned or leased by such other person and pursuant to which (i) the crop or livestock produced by such individual or the proceeds thereof are to be divided between such individual and such other person, and (ii) the amount of such individual's share depends on the amount of the crop or livestock produced, such individual is, with respect to such undertaking, an independent contractor and not an employee.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of the case.

* * *

(26 C.F.R., Sec. 31.3121(d)-1.)

Sec. 31.3121(d)-2 *Who are employers.*

(a) Every person is an employer if he employs one or more employees. Neither the number of employees employed nor the period during which any such employee is employed is material for the purpose of determining whether the person for whom the services are performed is an employer.

(b) An employer may be an individual, a corporation, a partnership, a trust, an estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group or entity. A trust or estate, rather than the fiduciary acting for or on behalf of the trust or estate, is generally the employer.

(c) Although a person may be an employer under this section, services performed in his employ may be of such a nature, or performed under such circumstances, as not to constitute employment (see Sec. 31.3121,b)-3).

(26 C.F.R., Sec. 31.3121(d)-2)

Sec. 31.3306(i)-1 *Who are employees.*

(a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word "employer" as used in this section only, notwithstanding the provisions of Sec. 31.3306(a)-1, includes a person who employs one or more employees.)

(b) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(c) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and em-

ployee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(e) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(f) Although an individual may be an employee under this section, his services may be of such nature, or performed under such circumstances, as not to constitute employment (see Sec. 31.3306(c)-2):
(26 CF.R., Sec. 31.3306(i)-1.)

Congressional Record, vol. 94 pps. 8268-8279, June 14. 1948, Representative Gerhart on Public Law 642:

> However, there crept into these decisions a little of what lawyers call obiter dicta; that is, some words were quite unnecessary to the result. These words were to the effect that, for purposes of social security, the Social Security Administration was not necessarily bound in extending the social-security coverage, by the ancient common-law definition of master and servant, or employer and employee, as you may choose to call it, but that they could take into the system as employees any persons who were dependent upon a business in the light of economic realities, thereby throwing into the entire system a confusion which required immediate legislative attention.

The Social Security Administration and the Treasury proceeded immediately to prepare a departmental regulation to carry that obiter dicta definition into effect. If this Congress had not interfered, tens of thousands of people in America who never dreamed they were employed by anybody and never for one moment thought they were covered by social security or subject to payroll taxes would have found that they had been swept into the social-security system by bureaucratic ukase. In other words they would suddenly have found that they had more employers than a dog had fleas. So, to end this confusion, this Congress acted promptly, and, after thorough-going debate, and by a vote of nearly 7 to 1, proceeded by legislation to put the matter in order once again by restoring the ancient doctrine of the common-law defining the relation of master and servant, employer and employee.

APPENDIX B

DECISION OF UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 58—September Term, 1965.

(Argued November 4, 1965 Decided March 22, 1966.)

Docket No. 29184

LIFETIME SIDING, INC.,
Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,
Defendant-Appellee.

Before:

KAUFMAN and HAYS, *Circuit Judges and*
TIMBERS, *District Judge.**

Appeal from a judgment of the United States District Court for the Western District of New York, John O. Henderson, *District Judge,* after a jury trial, dismissing the complaint in a tax refund suit brought to recover FICA and FUTA taxes in amount of $7,556.80, the jury having found by special verdict that certain roofing and siding applicators were employees of appellant rather than independent contractors.

Affirmed.

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* Chief Judge of the District of Connecticut, sitting by designation.

THOMAS C. HARTZELL, Rochester, N. Y., *for plaintiff-appellant.*

MARVIN J. GARBIS, Attorney, Department of Justice, Washington, D. C. (John B. Jones, Jr., Acting Assistant Attorney General, Lee A. Jackson and George F. Lynch, Attorneys, Department of Justice, Washington, D. C., John T. Curtin, United States Attorney, and Stephen S. Joy, Assistant United States Attorney, Buffalo, N. Y., on the brief), *for defendant-appellee.*

TIMBERS, *District Judge:*

Lifetime Siding, Inc., a New York corporation engaged in the vicinity of Rochester in selling and applying new roofing and siding for homes in need of repair, appeals from a judgment of the United States District Court for the Western District of New York, John O. Henderson, *District Judge,* after a 4 day jury trial, dismissing its complaint in a tax refund suit brought pursuant to 28 U. S. C. §1346(a)(1) to recover $7,556.80 of social security and unemployment taxes claimed to have been erroneously assessed and collected during the tax periods from July 1, 1957 through June 30, 1960 pursuant to the Federal Insurance Contributions Act (FICA)[1] and the Federal Unemployment Tax Act (FUTA).[2] On this appeal the critical issues are (1) whether the district court submitted to the jury under correct instructions the question whether the roofing and siding applicators were employees of appellant

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1 Int. Rev. Code of 1954, §§3101, 26 U. S. C. §§ 3101, 3111 (1958).

2 Int. Rev. Code of 1954, § 3301, 26 U. S. C. § 3301 (1958).

rather than independent contractors within the meaning of the statutes[3] and (2) whether the jury's special verdict that the applicators were employees is supported by the evidence. We hold that the question was correctly submitted to the jury and that the jury's special verdict is amply supported by the evidence. Accordingly, we affirm.[4]

Facts

Lifetime Siding, Inc. (the "company") employed salesmen (its employees, to be distinguished from "applicators") who obtained written contracts from home owners for application of roofing and siding materials to houses. The company checked the customer's credit; if satisfactory,

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3 Int. Rev. Code of 1954, §§3121 (d) (2) and 3306(i), 26 U. S. C. §§3121(d) (2) and 3306(i) (1958).

4 The provisions of the social security and unemployment tax statutes here involved (as well as their predecessors) and the treasury regulations promulgated thereunder have been the subject of numerous decisions in this Circuit and elsewhere upon the issue of whether certain workmen (including roofing and siding "applicators") are employees or independent contractors. *Ben v. United States*, 241 F. 2d 127 (2 Cir. 1957), *affirming* 139 F. Supp. 883 (N. D. N. Y. 1956) (applicators); *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Higgins*, 189 F. 2d 865 (2 Cir. 1951) (circus performers); *Radio City Music Hall Corp. v. United States*, 135 F. 2d 715 (2 Cir. 1943) (actors); *Texas Co. v. Higgins*, 118 F. 2d 636 (2 Cir. 1941) (gasoline and oil distributor); *E. F. Williams Co. v. United States*, 139 F. Supp. 875 (N. D. N. Y. 1956) (applicators); *Silver v. United States*, 131 F. Supp. 209 (N. D. N. Y. 1954) (applicators). See *Bartels v. Birmingham*, 332 U. S. 126 (1947) (members of name bands); *United States v. Silk*, 331 U. S. 704 (1947) (coal unloaders and truck drivers); *Hoosier Home Improvement Company v. United States*, 350 F. 2d 640 (7 Cir. 1965) (applicators); *McGuire v. United States*, 349 F. 2d 644 (9 Cir. 1965) (truck unloaders or swampers); *Service Trucking Co. v. United States*, 347 F. 2d 671 (4 Cir. 1965) (truck unloaders or gypsy chasers); *Ben Construction Corp. v. United States*, 312 F. 2d 781 (Ct. Cl. 1963) (applicators); *United States v. Thorson*, 282 F. 2d 157 (1 Cir. 1960) (applicators); *Westover v. Stockholders Publishing Company*, 237 F. 2d 948 (9 Cir. 1956) (newspaper route men and dealers). Cf. *Enochs v. Williams Packing & Navigation Co.*, 370 U. S. 1, 3 (1962) (fishermen).

the company made out a work order and gave it to an applicator who performed the work of affixing the roofing and siding materials to the building.

The work order given to the applicator described the work to be done, the amount of material to be applied, and the sum to be paid the applicator computed at $10 per square of material to be applied (a square consisting of 100 square feet). The applicator was directed to pick up a completion slip from the customer and, in some instances, a specified sum of money. The applicator was paid when the job was completed.

The required materials were furnished by the company and were delivered to the job site by the wholesaler at the company's request. Applicators provided their own tools, equipment and transportation. Aside from these items, they incurred no other expenses on the job. No time was specified within which the job must be completed.

The company's general manager inspected jobs in progress to see if the work was being performed according to specifications and in a workmanlike manner. Signs were placed at some job sites reading "Lifetime Siding, Inc." If the work was being done unsatisfactorily, the general manager would take the applicator off the job and bring in another crew to finish it. When completed work had to be corrected, the applicator was brought back to make the repairs without additional compensation.

Applicators were obtained through the company's newspaper advertisements promising "year-round steady work." The company's general manager passed on their capabilities, hiring only experienced men who did not need much supervision. While the company had hundreds of applicators on its pay records during the course of a year, there were about 25 regulars upon whom it could rely. Dur-

ing the years in question, the company had applicators who had worked from 5 to 10 years. It was the company's practice to continue using an applicator as long as his work was satisfactory. Applicators were free to turn down work orders from the company, but seldom did so. While free to take jobs on their own, applicators were encouraged to turn leads over to the company if they "wanted to work steady." They determined their own working hours, arranged their own work schedules and hired and paid their own helpers.

The company carried liability insurance for the applicators, although some carried their own. The benefits of a company pension plan, upon which the company paid all premiums, were made available to those applicators who had worked for the company 4 or more years. Bonus or vacation payments were given to the applicators based on their length of service.

There was other evidence, some indicating the employee status of the applicators and some pointing toward an independent contractor status. The foregoing summary is sufficient, however, to demonstrate that upon what may be said to have been a close question of fact the jury's special verdict that the applicators were employees and not independent contractors was amply supported by the evidence. The verdict must stand if the question ws submitted to the jury under correct instructions.

Standard for Determining Status of Applicators

The FICA and FUTA taxes here involved are measured by "wages" paid by an employer to an employee.[5] The definition of an "employee" under the FICA is "any individual who, under the usual common law rules applicable in de-

5 Int. Rev. Code of 1954, §§3111, 3301, 26 U. S. C. §§3111, 3301 (1958).

termining the employer-employee relationship, has the status of an employee.'"[6] Under the FUTA the term "employee" is defined to exclude "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor.'"[7]

The district court instructed the jury, in a charge to which no exceptions were taken, that the test to be used in determining the status of the applicators is the common law one applicable in tort actions under the doctrine of *respondeat superior:*

> "Generally, an employer-employee relationship exists when the person for whom the services are performed has the right to control and direct the individual who performs the service, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what is to be done, but also as to how and when it shall be done."

We hold that this is the correct test for determining whether employee status exists for purposes of FICA and FUTA taxes. As Judge Learned Hand succinctly stated in *Radio City Music Hall Corp. v. United States,* 135 F. 2d 715, 717 (2 Cir. 1943), "The test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said. . . ." See cases cited *supra* note 4; Restatement (Second), Agency §220(2) (1958); Treas. Reg. §31.3121(d)-1(c)(2) (1954).

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6 Int. Rev. Code of 1954, §3121 (d) (2), 26 U. S. C. æ3121 (d) (2) (1958).

7 Int. Rev. Code of 1954, æ§3306(i), 26 U. S. C. ææ3306(i) (1958).

The district court enumerated some 18 relevant factors which the jury might take into account in applying the test it prescribed to determine the status of the applicators, emphasizing that no single factor was determinative. We hold that the district court was correct in so instructing the jury.

Appellant, having taken no exceptions to the charge and having failed to request the court further to charge the jury, may not be heard in this Court on its claim of "Basic Errors in Charge of The Court." Rule 51, Fed. R. Civ. P.; *Guarnieri v. Kewanee-Ross Corp.*, 270 F. 2d 575, 577 (2 Cir. 1959); *Maupin v. Erie R. Co.*, 245 F. 2d 461, 462 (2 Cir. 1957); *Troupe v. Chicago, D. & G. Bay Transit Co.*, 234 F. 2d 253, 259-260 (2 Cir. 1956); *Kane v. American Tankers Corp. of Delaware*, 219 F. 2d 637, 640 (2 Cir. 1955); *United States v. Bruswitz*, 219 F. 2d 59 (2 Cir. 1955), *cert. denied*, 349 U. S. 913 (1955); *Moore v. Waring*, 200 F. 2d 491, 492 (2 Cir. 1952); *Falkerson v. New York, New Haven & Hartford R. Co.*, 188 F. 2d 892, 896 (2 Cir. 1951); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 136 F. 2d 844 (2 Cir. 1943); 5 Moore's Federal Practice ¶¶51.03, 51.04, at 2502-2506 (2d ed. 1964).

Admissibility of Exhibits on Issues of Intent

Appellant urges as error the admission in evidence of various exhibits, and testimony with respect thereto, purporting to reflect the intent and belief of the parties as to the status of the applicators. Such evidence included a ruling by the New York State Labor Department, obtained at the request of the company's counsel, that the applicators were "independent persons" for the purposes of the state unemployment tax; a determination by the Internal Revenue Service, obtained at the request of the company's

counsel, that the company's pension plan, which was open to the applicators, qualified for certain tax benefits because the applicators were treated as "employees"; records showing the withholding of income taxes by the company from payments to the applicators; worksheets or contracts between the company and the applicators in which the latter were referred to as "subcontractors"; correspondence from the company's president to the Better Business Bureau of Buffalo and to a customer referring to the applicators in substance as employees; and a pamphlet, "The Voice of Lifetime," distributed by the company to the applicators, in which there appears the statement, "It seems that so often the salesmen forget that it's a team of sales personnel, office personnel and applicators that get the job done at Lifetime."

Appellant's claim of error with respect to this evidence is two-fold: (1) that it was irrelevant because the intent and belief of the parties as to the status of the applicators should have no bearing upon the determination of the relationship between the company and the applicators; and (2) that it was prejudicial because the references in the exhibits to such labels as "employees," "independent persons" and "subcontractors" may have confused and mislead the jury in its determination of the ultimate issue of whether the applicators were employees or independent contractors.

We reject appellant's claim that such evidence was irrelevant. The intent and belief of the parties as to the relationship between the company and the applicators was one of the factors, among many, to be considered by the jury. The district court so charged the jury. We have held that this charge was correct. No exceptions were taken.

Whether such evidence was prejudicial presents a closer question. The district court, in our view, properly could have excluded or admitted it. That is to say, it was within

the court's discretion basically to determine whether the probative value of the evidence was outweighed by the possibility of prejudice and confusion from its admission. Uniform Rule of Evidence 45; *United States v. Byrd*, 352 F. 2d 570, 574 (2 Cir. 1965); *United States v. Feldman*, 136 F. 2d 394, 399 (2 Cir. 1943). We cannot say that the district court, sensitive to the pulse of the trial, abused its discretion in admitting the evidence—particularly in view of the court's limiting instructions when the evidence was admitted and its careful, painstaking charge that the evidence was to be considered only to the extent that it reflected the intent and belief of the parties as to the status of the applicators, and that such intent and belief was but one factor to be considered. We must assume that the jury followed the court's instructions, absent any indication to the contrary. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 485 (1933); *Stevenson v. Hearst Consol. Publications, Inc.*, 214 F. 2d 902, 911 (2 Cir. 1954); *Atchison, T. & S. F. R. Co. v. Andrews*, 211 F. 2d 264, 267 (10 Cir. 1954).

We hold that the district court properly admitted, and correctly instructed the jury concerning, the evidence reflecting the intent and belief of the parties as to the status of the applicators.

Propriety of Jury Determination of Issue of Status of Applicators

The instant tax refund action was brought against the United States pursuant to 28 U. S. C. §1346(a)(1) to recover taxes alleged to have been "erroneously paid to and unlawfully collected by the defendant." Congress has provided in 28 U. S. C. §2402 that "any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a

jury." Under Rule 38(a), Fed. R. Civ. P., "The right of trial by jury . . . as given by a statute of the United States shall be preserved to the parties inviolate." And, by the terms of Rule 39(a), once trial by jury has been demanded as provided in Rule 38(b), "trial of all issues so demanded shall be by jury" unless the parties stipulate to trial by the court without a jury or the court finds "that a right of trial by jury of some or all of those issues does not exist under the . . . statutes of the United States."

Here a timely demand for jury trial was endorsed by the United States upon its answer in an action in which a jury trial is expressly provided by statute. Absent specification of certain issues to be tried by jury, all issues are to be so tried. Rule 39(c).

Appellant's position, as we understand it, is not that the case is one that should not have been tried to a jury; rather, appellant contends that a verdict should have been directed in its favor on the ground that upon the undisputed facts the court should have determined that the applicators were independent contractors as a matter of law. We disagree.

As we have indicated above, the evidence presented a close question of fact which, under the controlling statutes, could be resolved only by the trier of the facts—here, the jury. We cannot say, as a matter of law, that upon the record before us reasonable men could not find that the applicators were employees and not independent contractors.

The situation here presented is closely parallel to that summarized by Judge Sobeloff in *Service Trucking Co. v. United States,* 347 F. 2d 671, 673 (4 Cir. 1965):

> "The facts stressed by the taxpayer indicate at most that the question of the unloaders' status is a debatable one, that is, one upon which reasonable men could differ. It cannot reasonably be said that this

> record points indisputably to but a single answer. If such were the case it would have been the duty of the Judge to grant a peremptory instruction to the jury. But analysis of the facts warrants different determinations depending on the relative weight and significance the fact finder attaches to various circumstances shown. The question was properly left to the jury, for in the system prevailing in federal trials this is within the jury's province, not that of the judge. Weighing the above facts and the conflicting inferences deducible therefrom, the jury found that the unloaders were employees of the taxpayer, not independent contractors. In this situation we are required to affirm the judgment based upon the jury's resolution of the issue in favor of the Commissioner of Internal Revenue. Commissioner of Internal Revenue v. Duberstein, 363 U. S. 278, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960)."

See *Baker v. Texas & Pac. R. Co.*, 359 U. S. 227, 228 (1959); *Hoosier Home Improvement Co. v. United States*, 350 F. 2d 640, 643 (7 Cir. 1965).

We are not unmindful of the difficulties inherent in jury trial of issues even as relatively simple as those here involved.[8] Every district judge shudders at the prospect of presiding over the trial of a tax refund case with a jury. And issues far more complex than those presented by the instant case have been resolved by juries in tax refund cases. See, e.g., *United States v. Duke Laboratories, Inc.*, 337 F. 2d 280 (2 Cir. 1964) (accumulated earnings tax). While we may question the *wisdom* as a matter of policy of claiming such a case for jury trial, raising judicial eye-

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8 See, generally, James, *Right To A Jury Trial In Civil Actions*, 72 Yale L. J. 655 (1963); 5 Moore's Federal Practice ¶38.16 (2d ed. 1964).

brows is about all we can do. Certainly it is not within our competence to question the *right* to jury trial granted by Congress; nor may we reverse the denial of a directed verdict upon an issue, properly claimed for jury trial, unless "reasonable men could not reach differing conclusions on the issue." *Baker v. Texas & Pac. R. Co., supra* at 228. This is not such a case.

We hold that the instant case was one properly claimed for jury trial, that the district court correclty denied appellant's motion for a directed verdict and that it properly submitted to the jury the question whether the applicators were employees of appellant or independent contractors.

Since we affirm the district court, there is no need for us to reach the further question raised by appellant whether we have the power to reverse and direct the entry of judgment in favor of appellant, or merely to order a new trial, absent a specific motion by appellant for judgment n.o.v See *Johnson v. New York, New Haven & Hartford R. Co.*, 344 U. S. 48 (1952); *Guarnieri v. Kewanee-Ross Corp.*, 270 F. 2d 575, 580 (2 Cir. 1959); *McKee v. Sheraton-Russell, Inc.*, 268 F. 2d 669, 671-672 (2 Cir. 1959).

Affirmed.